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(2)

No. 07-62

In The

Supreme Court of the United States

HECK VAN TRAN,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The Tennessee Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1. Does the failure of the states to apply a uniform clinical definition of mental retardation and to interpret the definition in accord with scientific principles violate the Eighth and Fourteenth Amendments to the United States Constitution?

2. Do the states violate Due Process of Law by using fact-finding procedures to evaluate a defendant's mental retardation that produce unreliable and inconsistent results that cannot be reconciled with a reasonable interpretation of *Atkins v. Virginia*?

3. Does the failure of the states to require that a jury determine whether a capital defendant is mentally retarded, beyond a reasonable doubt, before the defendant may be sentenced to death violate the Sixth Amendment and the principles of *Apprendi v. New Jersey* and *Ring v. Arizona*?

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OPINION BELOW

The opinion of the Tennessee Court of Criminal Appeals that is the subject of this petition is unpublished. (Pet. App. 1)

STATEMENT OF JURISDICTION

The judgment of the Tennessee Court of Criminal Appeals affirming the trial court's denial of post-conviction relief was filed November 9, 2006. (Pet. App. 1) The Tennessee Supreme Court denied petitioner's request for discretionary review on April 16, 2007. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

The relevant provision of Tennessee's capital sentencing statute defining mental retardation, Tenn. Code Ann. § 39-13-203 (2003), provides as follows:

> **Mentally retarded defendants – Death sentence prohibited.** – (a) As used in this section, "mental retardation" means:
>
> (1) Significantly subaverage general intelligence functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;
>
> (2) Deficits in adaptive behavior; and

(3) The mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age.

STATEMENT OF THE CASE

I. Procedural History

In 1989, the petitioner, Heck Van Tran, was convicted of three counts of first-degree felony murder for the shooting deaths of Kai Yin Chuey, Amy Lee and Arthur Lee. A jury sentenced the petitioner to death for each of the murders. Additionally, the jury found the petitioner guilty of robbery by use of a deadly weapon, and the trial court sentenced him to 30 years' imprisonment for this conviction, to be served concurrently to the petitioner's death sentences. On direct appeal, the Tennessee Supreme Court affirmed the petitioner's felony murder conviction and death sentence as to Kai Yin Chuey. The Court also affirmed the petitioner's felony murder convictions for the murders of Amy and Arthur Lee; however, it reversed the petitioner's death sentences for these murders, finding that the jury had incorrectly applied a statutory aggravating circumstance. *State v. Van Tran*, 864 S.W.2d 465, 480 (Tenn. 1993). On remand, the defendant received two concurrent life sentences for the murders of Amy and Arthur Lee.

On March 7, 1995, the petitioner filed a petition for post-conviction relief in the Shelby County Criminal Court, alleging, *inter alia*, that he was incompetent to

be executed. Following a hearing, the trial court denied post-conviction relief, and the Tennessee Court of Criminal Appeals affirmed. *Van Tran v. State*, C.C.A. No. 02C01-9803-CR-00078, 1999 WL 177560 (Tenn. Crim. App. Apr. 1, 1999).

Petitioner then filed an application for permission to appeal to the Tennessee Supreme Court, which was granted on the issue of whether a petitioner could raise a claim of incompetency for execution in a petition for post-conviction relief. On review, the court determined that a proceeding for post-conviction relief is not the appropriate avenue for litigating the issue of competency to be executed. Therefore, the court refused to consider the petitioner's competency claim. *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999).

On February 7, 2000, the petitioner filed a motion to re-open his petition for post-conviction relief, alleging that he is mentally retarded, and, therefore, may not be executed under Tenn. Code Ann. § 39-13-203. The trial court denied the petitioner's motion to reopen, and the Court of Criminal Appeals denied the petitioner permission to appeal. *See* Tenn. Code Ann. § 40-30-117(c) ("If the motion [to reopen] is denied, the petitioner shall have ten (10) days to file an application in the court of criminal appeals seeking permission to appeal."). The petitioner then filed an application for permission to appeal to the Tennessee Supreme Court, which the court granted. On review, the court held, for the first time in Tennessee, that execution of a mentally retarded criminal defendant

violates the Eighth Amendment of the United States Constitution, as well as Article 1, § 16, of the Tennessee Constitution. It also held that the prohibition against executing a mentally retarded defendant was a new constitutional rule warranting retroactive application to cases on collateral review and, as such, could be raised in a motion to reopen a petition for post-conviction relief. Accordingly, it remanded the case for a hearing on the issue of the petitioner's mental retardation. *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001).

Following an evidentiary hearing, the trial court concluded that petitioner was not mentally retarded as defined by Tenn. Code Ann. § 39-13-203. The Tennessee Court of Criminal Appeals affirmed, finding ample evidence in the record to support the trial court's conclusion that petitioner failed to prove that he is mentally retarded by a preponderance of the evidence. *Van Tran v. State*, No. W2005-01334-CCA-R3-PD, 2006 WL 3327828 (Tenn. Crim. App. Nov. 9, 2006) (perm. app. denied). (Pet. App. 1) Petitioner sought discretionary review by the Tennessee Supreme Court under Tenn. R. App. P. 11(a), but the Court denied his request on April 16, 2007.

II. Facts Pertinent to the Petition

Under Tennessee law, mental retardation is defined as: (1) significantly sub-average intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below; (2) deficits in

adaptive behavior; and (3) the mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age. Tenn. Code Ann. § 39-13-203. All three criteria must be satisfied to render a defendant ineligible for the death penalty in Tennessee.

Following an evidentiary hearing, the state post-conviction court concluded that petitioner failed to meet two of the three criteria. Although the court found that petitioner had demonstrated that he currently had an I.Q. of 70 or below, it concluded that petitioner failed to demonstrate deficits in adaptive behavior or that any such deficits manifested during the developmental period. (Pet. App. 28-35) The Tennessee Court of Criminal Appeals affirmed, observing that "the ultimate issue of whether a person is, in fact, mentally retarded for purposes of the constitutional ban on excessive punishment is one for the finder of fact, based upon all of the evidence and determinations of credibility." (Pet. App. 50) Taking into account the "unique circumstances" of the petitioner's case – including his social history of abuse, neglect and social ostracism, the fact that he "lived on the streets" in Vietnam until coming to this country at age 17, his limited formal education both in Vietnam and in the United States, his limited proficiency with the English language, a history of drug and alcohol abuse, and a diagnosis of paranoid schizophrenia – the court concluded that the record supported the trial court's finding that petitioner was not

mentally retarded as defined in Tenn. Code Ann. § 39-13-203.

> The circumstances of every case are unique as are the circumstances of every defendant. Circumstances exist in this case which cloud the picture, particularly contradictory proof regarding the Petitioner's Vietnamese background, *i.e.*, whether Vietnamese or English is the Petitioner's proficient language. . . . Additionally, extraneous factors, i.e., drug use and mental illness, further skew the determination of mental retardation. These factors, in connection with the requirement that experts must speculate retrospectively as to what conditions existed prior to the age of eighteen and the obvious motivation in making such claim, further complicate this court's duty on appeal. We defer to the trial court's determinations of credibility and adopt the trial court's ultimate findings of fact.

(Pet. App. 55-56)

Petitioner now seeks an appeal to this Court.

ARGUMENT

I. TENNESSEE'S STATUTORY DEFINITION OF MENTAL RETARDATION AND PROCEDURES FOR DETERMINING MENTAL RETARDATION DO NOT CONFLICT WITH THIS COURT'S DECISION IN *ATKINS V. VIRGINIA*.

Petitioner contends that certiorari is warranted to address the failure of the states to apply a uniform clinical definition of mental retardation and to "interpret that definition in accordance with scientific principles." This failure, according to the petitioner, violates the Eighth and Fourteenth Amendments to the United States Constitution. However, this Court has never established a constitutional definition for mental retardation. To the contrary, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court explicitly left to the individual states "the task of developing appropriate ways to enforce the constitutional restrictions upon its execution of sentences." *Atkins*, 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). *See also Bell v. Cockrell*, 310 F.3d 330, 332 (5th Cir. 2002) (*Atkins* did not conclusively define mental retardation); *Pruitt v. State*, 834 N.E.2d 90, 107 (Ind. 2005) (same); *Gray v. State*, 887 So.2d 158, 168 (Miss. 2004) ("Determining who is mentally retarded for purposes of this prohibition has been left to the individual States."); *Johnson v. State*, 102 S.W.3d 535, 540 (Mo. 2003) ("*Atkins* did not define the perimeters of mental retardation, but left 'to the States the task of' " enforcing the restriction).

In 1991, the Tennessee General Assembly enacted Tenn. Code Ann. § 39-13-203, which provides in part as follows:

> (a) As used in this section, "mental retardation" means:
>
> (1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;
>
> (2) Deficits in adaptive behavior; and
>
> (3) The mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age.
>
> (b) Notwithstanding any provision of law to the contrary, no defendant with mental retardation at the time of committing first degree murder shall be sentenced to death.

Tenn. Code Ann. § 39-13-203 (1991).

Ten years later, in *Van Tran v. State,* 66 S.W.3d 790 (Tenn. 2001), the Tennessee Supreme Court held that "execution of a mentally retarded individual violates the Eighth Amendment to the United States Constitution and article I, § 16 of the Tennessee Constitution." *Van Tran*, 66 S.W.3d at 812. The state court reached this conclusion after "surveying the national landscape," as evidenced by legislative enactments and jury studies, and considering the societal consensus in Tennessee, as reflected in the "overwhelming vote and comments of the legislature"

in enacting Tenn. Code Ann. § 39-13-203. *Id.* at 801-05. In reviewing Tennessee's mental retardation statute, the Court observed that "the statutory definition of mental retardation in Tennessee adopts the nationally accepted definition of mental retardation." *Id.* at 794 (citing *Penry v. Lynaugh*, 492 U.S. 302, 308 n.1 (1989)). The Court thus directed application of the statutory definition of mental retardation set forth in Tenn. Code Ann. § 39-13-203 as the constitutional standard for Tennessee offenders. *See Van Tran*, 66 S.W.3d at 812 ("The applicable criteria [to determine petitioner's alleged mental retardation] are those presently set forth by statute").[1]

Six months after the Tennessee Supreme Court's decision in *Van Tran*, this Court held that execution of the mentally retarded constitutes cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution, which therefore places a substantive restriction on the state's power to execute a mentally retarded offender. *Atkins*, 536 U.S. at 321. Unlike the Tennessee Supreme Court, however, this

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[1] The Tennessee Supreme Court has interpreted provisions of the statutory definition twice since then. In *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004), the Court held that a strict application of the statutory criteria for retardation under § 39-13-203, specifically the numeric I.Q. requirement, was not contrary to this Court's holding in *Atkins* nor out of line with the standard adopted by numerous other states. In *Strode v. State*, __ S.W.3d __, No. M2005-00906-SC-R11-DD, 2007 WL 2316355 (Tenn. Aug. 14, 2007), the Court made clear that Tennessee law requires that mental retardation manifest by 18 years of age.

Court specifically refrained from imposing its own definition of the condition, although specifically noting that the various statutory definitions of mental retardation in effect at that time, including Tennessee's, while not identical, "generally conform to the clinical definitions," which require significantly subaverage intellectual functioning existing concurrently with related limitations in two or more adaptive skill areas and manifesting before age 18. *Atkins*, 536 U.S. at 309, n.3, 314 n.12, 317 n.22.

Petitioner contends that state legislatures have not adopted a uniform definition of mental retardation in the aftermath of *Atkins*. But, as noted above, the Court recognized the possibility of some variation among state standards, though suggesting that at least "general conformity" with clinical definitions may be required. More importantly, the Court recognized Tennessee's statute as falling among those forming the "national consensus" on which the *Atkins* prohibition was grounded. In short, Tennessee's definition falls within the range of flexibility allowed by the consensus found in *Atkins*.

Moreover, petitioner's specific complaints about disparate standards bear little relation to his own case. For example, petitioner challenges Tennessee's demarcation of an I.Q. of 70 as the boundary of intellectual functioning for mental retardation as inconsistent with the American Association of Mental Retardation and some other states. However, in this case, the trial court concluded that petitioner had, in fact, satisfied this statutory criterion in that "he

currently has a functional intelligence quotient of seventy (70) or below." The Court of Criminal Appeals agreed with the trial court's assessment. (Pet. App. 43)

Petitioner's complaints about the Tennessee courts' assessment of his adaptive behavior limitations amounts to little more than a disagreement with the state courts' factual findings. In assessing this criterion, the Tennessee Court of Criminal Appeals specifically applied the standard espoused by the American Psychiatric Association, which was cited by this Court in *Atkins* as being among the clinical definitions about which there was a national consensus in the area of capital punishment. *Atkins*, 536 U.S. at 309 n.3, 317 n.22. Moreover, the state court's determination in this instance was largely fact-bound under the unique circumstances of the petitioner's case. For example, the state court noted that the weight accorded standardized testing devices was lessened by petitioner's atypical life experience[2]

[2] After spending much of his young life on the streets of Vietnam, petitioner spent only three years as a free person in this country before being incarcerated for the ten years that preceded administration of the testing related to this case. As a result, "due to the unique circumstances of the petitioner's background, some of the questions posed on the Independent Living Scale border on the absurd." (Pet. App. 50) Likewise, the Vineland test asks participants to "evaluate the petitioner as if he were a functioning member of this society." Yet, as the state court observed, "[w]hen the test was administered, the petitioner had been incarcerated for over ten years . . . in a manner that severely restricts his activities and in a manner that

(Continued on following page)

and the fact that the petitioner, whose first language is Vietnamese, "has a limited grasp of the English language." (Pet. App. 32) The court also gave little weight to deficits in reading proficiency and language skills after observing that the petitioner "only attended school in the United States for one year and attended school in Vietnam sporadically for a period of only two years." (Pet. App. 33) In addition, the state court's decision was properly informed by the petitioner's own actions in the planning, perpetration, escape and aftermath of the murders in this case. (Pet. App. 51-52)

As the Tennessee Court of Criminal Appeals observed, the "adaptive behavior criteria are exceedingly subjective," and, ultimately, "the issue of whether a person is, in fact, mentally retarded for purposes of the constitutional ban on excessive punishment is one for the finder of fact, based upon all of the evidence and determinations of credibility." (Pet. App. 50)

> We agree with the trial court's assessment that the Petitioner is in a unique position. The Petitioner was born in Vietnam. There is no question that Petitioner's childhood was

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provides a strictly controlled environment." The court thus gave little weight to tests given to his mother – who had little opportunity to observe the petitioner in a traditional setting and is herself "barely a functioning member of this society" – and to a prison guard – who has never observed the petitioner in any environment other than a strictly controlled prison setting. (Pet. App. 50-51)

> atypical. His social history reveals abuse, neglect, and social ostracism. He essentially "lived on the streets" until age seventeen when he came to this country through the assistance of Catholic Charities. The Petitioner's formal schooling was limited to several years in Vietnam and about one year in this country. The Petitioner has spent the majority of his time in this country incarcerated. While the Petitioner's experts maintained that the Petitioner was more proficient in the English language than in Vietnamese, proof at the Petitioner's original post-conviction hearing indicated that the Petitioner had difficulty communicating with trial counsel until a Vietnamese interpreter was appointed. A social worker with Catholic Charities testified that the Petitioner spoke and understood the Vietnamese language. The Petitioner has a history of drug and alcohol use. The Petitioner has also been diagnosed with paranoid Schizophrenia. The proof also corroborates the trial court's conclusion that the Petitioner was in a position unique to most American adults. . . . Accordingly, we agree with the trial court's assessment that little weight should be given to the Petitioner's below average score on the Independent Living Scale.

(Pet. App. 50-51)

Finally, while it is true that Tennessee strictly adheres to a requirement that mental retardation be manifest by 18 years of age, *see Strode, supra* n.1, the

state's rule of strict adherence was in no way dispositive in petitioner's case. As the Tennessee Court of Criminal Appeals noted, petitioner had not been administered *any* test of intellectual functioning before reaching 18 years of age, and no testing was performed until ten years after his incarceration at age 22. (Pet. App. 54)

> The only proof establishing this third prong were reliance upon social factors present in the Petitioner's childhood, including extreme poverty and child abuse. In this regard, we cannot conclude that the trial court's conclusion that the Petitioner's late development could have been the result of "neglect" rather than neurological deficit was in error or contrary to the evidence. The evidence of poverty, child abuse, lack of education, family dysfunction and poor social conditions are not enough to demonstrate that any deficits manifested during the developmental period. The proof established that the Petitioner supported himself, took care of others, and was employed. The proof also established that the Petitioner, with the aid of an interpreter, was able to assist and communicate with his trial attorneys. The occurrences of these abilities all occurred after the age of eighteen.

(Pet. App. 54-55) Moreover, the definition of mental retardation held by both the American Association on Mental Retardation and the American Psychiatric Association require manifestation before the age of 18. *Atkins*, 536 U.S. at 309 n.3.

While petitioner cites numerous cases in an attempt to demonstrate some disparity in standards, this case plainly illustrates that a mental-retardation inquiry is inherently fact-bound. Contrary to petitioner's contentions, his death sentence is not the result of any arbitrariness and disparity in the state-court implementation of *Atkins*. Petitioner was sentenced to death in 1989 after a Tennessee jury found, beyond a reasonable doubt, that his commission of first-degree murder was "especially cruel in that it involved depravity of mind" and was part of "mass murder," and that these aggravating factors were not outweighed by any mitigating circumstances. *Van Tran*, 864 S.W.2d at 470. Petitioner remains under a death sentence because he failed to demonstrate in the aftermath of *Atkins* that he is mentally retarded under Tennessee's statutory definition – the same definition that comprised the body of state statutes forming the "national consensus" which provided the basis of the constitutional prohibition recognized in *Atkins*.

Finally, petitioner's argument concerning disparate fact-finding procedures provides no basis for a grant of certiorari. In *Atkins*, this Court held that executing some mentally retarded offenders is prohibited by the Eighth Amendment while leaving to the states the task of developing a means of determining which offenders are sufficiently impaired in intellectual functioning and adaptive skills to be exempt from capital punishment. *Atkins*, 536 U.S. at 317-18. The State of Tennessee afforded petitioner counsel,

funding for multiple mental health experts, and an opportunity to be heard in the trial court on his retardation claim. He was afforded an appeal as of right to the Tennessee Court of Criminal Appeals and an opportunity for discretionary review by the Tennessee Supreme Court. Although couched in due process terms, petitioner's argument is, in essence, an invitation for this Court to correct what he deems to be erroneous factual findings regarding mental retardation by the Tennessee courts, a purpose for which certiorari is rarely granted. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). The current petition represents little more than a debate on the sufficiency of the evidence supporting the state court's conclusion, based on the unique circumstances of his case, that petitioner is not mentally retarded, and provides no proper basis for certiorari.

Because petitioner cannot show that the standard in Tennessee or that the procedures employed in his case fail to comport with the constitutional standard announced in *Atkins*, certiorari under Sup. Ct. R. 10(c) is not warranted.

II. TENNESSEE'S STATUTORY PROCEDURE FOR DETERMINING MENTAL RETARDATION IN THE CAPITAL PUNISHMENT CONTEXT DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *RING V. ARIZONA*.

Finally, petitioner contends that certiorari is warranted to enable this Court to declare that the "absence of mental retardation" constitutes an element of capital murder, which must be determined beyond a reasonable doubt by a jury under the principles set forth in *Ring v. Arizona*, 536 U.S. 584 (2002). Under Tennessee law, a judge rather than a jury determines the issue of mental retardation. Tenn. Code Ann. § 39-13-203(d). *See also Van Tran*, 66 S.W.3d at 812 (remand order directing trial court to make determination on mental retardation). The decision in *Ring* does not require a different result in this case or any other. And even if *Ring* could be read to impose such a requirement in the mental retardation context, the procedural rule announced in *Ring* is not retroactively applicable to cases, like petitioner's, on collateral review of a final criminal judgment. *See Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (*Ring* properly classified as procedural rather than substantive and, thus, did not apply to death penalty case already final on direct review). *See also Teague v. Lane*, 489 U.S. 288, 301 (1989) ("unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced").

In *Ring*, this Court held that Arizona's enumerated *aggravating factors* "operate as the functional equivalent of an element of a greater offense" and must be found by a jury, rather than a judge, under the Sixth Amendment's jury trial guarantee. *Ring*, 536 U.S. at 609. The Court made clear that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). However, as the Fourth Circuit observed in *Walker v. True*, 399 F.3d 315, 326 (4th Cir. 2005), a finding of retardation does not increase the penalty for the crime beyond that authorized by the jury's verdict alone. *See also In re Johnson*, 334 F.3d 403, 405 (Va. 2003) ("[T]he absence of mental retardation is not an element of the offense any more than sanity is an element of the offense.").

Tennessee's capital sentencing scheme avoids the constitutional infirmity identified in *Ring* because it requires that the jury find any statutory aggravating circumstance beyond a reasonable doubt. Tenn. Code Ann. § 39-13-204(f)(1), (i) (2003). Moreover, as the Tennessee Supreme Court noted in *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004) – in which it rejected the notion that a capital defendant is entitled to a jury determination of retardation – Tennessee's position "is in line with an ever-growing number of courts to have considered the issue and held likewise." *Howell*, 151 S.W.3d 467 (citing, *inter alia, In re Johnson*, 334

F.3d 403 (5th Cir. 2003); *Russell v. State*, 849 So. 2d 95 (Miss. 2003); *State v. Flores*, 93 P.3d 1264 (N.M. 2004); *Head v. Hill*, 587 S.W.2d 613 (Ga. 2003); *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002)). Indeed, petitioner here identifies no decision of another state court of last resort or federal court of appeals that holds to the contrary.

Certiorari is not warranted under Sup. Ct. R. 10(b) or (c).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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